JAN 24 1959
JAMES R. BROWNING, C

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1958

No. 153

NORTON R. GANGER, L. C. BETHART, THOMAS B. HAMILTON ET AL.,

Appellants,

vs.

CITY OF MIAMI, A MUNICIPAL CORPORATION,

Appellee.

Appeal from the Supreme Court of the State of Florida

BRIEF OF APPELLEE

MILTON M. FERRELL
Five Fifty Building
550 Brickell Avenue
Miami 32, Florida
Attorney for Appellee

TOPICAL INDEX

	Page
STATEMENT OF THE CASE	1
JURISDICTION OF SUPREME COURT OF UNITED STATES	2
APPLICABLE CASES WHERE THE SUPREME COURT OF THE UNITED STATES WILL NOT TAKE JURISDICTION	10
CONCLUSION	12

TABLE OF CASES

	Page
BLACK v. CUTTER LABORATORIES 351 US 292, 100 L ed 1188, 76 S Ct. 824	10
BROWNING v. HOPPER 269 US 396, 70 L ed 330, 46 S Ct 141	8, 9
CHESEBRO v. LOS ANGELES COUNTY FLOOD CONTROL DISTRICT 306 US 459, 83 L ed 921, 59 S Ct 622	8
COVEY v. TOWN OF SOMERS 351 US 141, 100 L ed 1021, 76 S Ct 724	7
DURLEY v. MAYO 351 US 277, 100 L ed 1178, 76 S Ct 806	10
EDELMAN v. CALIFORNIA 344 US 357, 97 L ed 387, 73 S Ct 293	10
LAMBERT v. THE PEOPLE OF THE STATE OF CALIFORNIA 355 US 225, 2 L ed 2d 228, 78 S Ct 240	7
MEMPHIS & C.R. CO. v. PACE 282 US 241, 75 L ed 315, 51 S Ct 108	8, 9
MULLANE v. CENTRAL HANOVER BANK & TRUST COMPANY 339 US 306, 94 L ed 865, 70 S Ct 652	6
NEW YORK v. NEW YORK, N. H. & H. R. CO. 344 US 293, 97 L ed 333, 73 S Ct 299	6, 7
WALKER v. CITY OF HUTCHINSON 352 US 112, 1 L ed 2d 178, 77 S Ct 200	7
WALTERS v. ST. LOUIS 347 US 231, 98 L ed 660, 74 S Ct 505	10
WISCONSIN ELECTRIC POWER COMPANY v. CITY OF MILWAUKEE 352 US 948, 1 L ed 2d 241, 77 S Ct 329	7

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1958

No. 153

NORTON R. GANGER, L. C. BETHART, THOMAS B. HAMILTON ET AL.,

Appellants,

vs.

CITY OF MIAMI, A MUNICIPAL CORPORATION,

Appellee.

Appeal from the Supreme Court of the State of Florida

BRIEF OF APPELLEE

STATEMENT OF THE CASE

There is involved two appeals in two separate suits from decisions of the Supreme Court of Florida. The questions of law and fact in the two cases being the same or similar, the decision of the Supreme Court of Florida in one was made applicable to the other. These are the decisions upon which was based the judgments appealed from. The final opinion of the Supreme Court of Florida

applicable to both suits is shown in the record at Pages 48 to 53, inclusive. A single petition for rehearing, applicable to both suits, was denied by the Supreme Court of Florida without any opinion. (R. 70-71). These suits involve the assessment of municipal improvement liens against property owners under a Florida statute for improvements to streets or roads.

JURISDICTION OF SUPREME COURT OF UNITED STATES

The appellee, CITY OF MIAMI, FLORIDA, moved to dismiss the appeals on the ground (a) that they were not within the jurisdiction of the Supreme Court of the United States, and, (b) the Federal questions presented were not passed on by the trial or appellate court in Florida. The United States Supreme Court postponed consideration of the question of jurisdiction to the hearing of the cases on the merits, and directed all counsel to discuss the question of whether the constitutional issues were raised and decided below.

The amended complaint which was substantially the same in both cases, among other things, stated that it was brought to invalidate special assessment liens (R 1), made under a City resolution (R 2); that notice of a meeting of the City Commission for the confirmation of this resolution was published in a newspaper (R-3-4); that no objections to such confirmation were filed. (R 5). The Constitution of the United States is only mentioned once in said amended complaint. (Par. 12 - R. 6). In this instance it states that the liens are void and constitute taking of property in violation of the Constitution of the United States upon seven (7) grounds specified therein. (Grounds

R 7). The said amended complaint nowhere makes any statement as to any particular article or section of the Constitution of the United States. The said seven (7) grounds do not mention any statute of the State of Florida other than Chapter 56 of the Charter of the City of Miami, and alleges concerning said Chapter 56 that the resolutions of the city "do not comply with Chapter 56 of the Charter of the City of Miami in that the properties against which the assessments were made were not designated as required by said Chapter." (Par. D - R 7). The other six grounds in substance allege that the resolution for the work was insufficient, that the notice published had defects, did not give notice and was improperly published, that the improvements were not for the benefit of the property owners, that the attempt to assess violated a rule laid down by the Florida Supreme Court, and that the apportionment of the cost between the proper owners was disproportionate to the benefits conferred. Nowhere in this complaint is there any charge that any statute of the State of Florida violates the Federal constitution, but only statements that actions taken by the city under a statute were legally insufficient or did not comply with the statute and that the property owners were not benefited. The prayer in this amended complaint was that the court decree the assessments to be void and enter an injunction. (R 8).

The final decree of the trial court nowhere therein mentions the Constitution of the United States or of the State of Florida. (R. 22 - 25). The said final decree after finding facts, among which were (a) "the notice was insufficient as a matter of law", and (b) "no benefit was conferred upon the property owners", (R. 23), then ordered that the city was without lawful authority to impose

the liens upon the property owners, and that the action of the city in so doing "was unreasonable and null and void."

So, we see that the final decree of the trial court did not pass upon any Federal or constitutional question at all.

Upon the appeal to the Supreme Court of Florida, and under the first majority opinion written by it, (R. 32-41) there was no discussion of any constitutional question either State or Federal. This opinion held in substance that the notice was valid and substantially conformed to the statute, (R. 35) that the court could not agree with the trial court, that there was no benefit to the property owners (R. 35), but that the City had no authority to levy the assessments under its Charter, (R. 36), and, therefore, the judgment of the lower court would be affirmed.

On a rehearing the Supreme Court of Florida wrote a majority opinion reversing the trial court (R. 48-53). This opinion did not discuss any constitutional question whatsoever. It held (a) the City did have power under its charter to assess the liens (R. 50), (b) the Court was unanimously of the opinion that the notice was valid and complied with the charter (R. 50), and (c) the property owners were estopped to question the assessments for their failure to promptly assert their rights (R. 52). The facts of estoppel are clearly set forth in a note at the bottom of pages 50-51 of the Record. Even the dissenting judges (R. 53-57) agreed with the majority on all matters except the holding that the City had the power under its charter to levy the assessments (R. 57). The dissentors held the assessment void for lack of statutory power to make them

and that because they were void the estoppel did not apply.

There was no Federal question involved or decided in any decision of any of the Florida Courts in these cases, trial or appellate. The only dispute among the judges was over the construction of the State Statute as to the power of the City of Miami to levy the assessments. The judgment of the trial court was placed squarely on the ground that the City was without authority to levy the assessments under said Statute (Par. 1 R. 24 following the words "Ordered, Adjudged and Decreed").

Amendment XIV to the Constitution of the United States was mentioned for the first time in the petition for rehearing of appellants (Par. 2. R. 64 and Par. 4 R. 65). The said paragraph 2 stated that lack of notice of the confirmation of the assessment roll was violative of procedural due process and the appellants should not be estopped. This paragraph totally disregards the facts found by the majority final opinion of the Appellate Court on estoppel showing the suit was filed more than a year after the assessments and showing other notices as to the improvements and as to confirmation of the roll without any objections filed (R. 50 - 51 note at bottom of pages).

The said paragraph 4 of the petition for rehearing of the appellants in substance stated that the holding by the Appellate Court, that the notice was sufficient and that the appellants were estopped to challenge lack of benefits to their property for their failure to object pursuant to such notice, was quasi judicial and violated Amendment XIV of the United States Constitution. To substantiate this the appellants cited United States Su-

preme Court decisions. These decisions are also cited by the appellants in their brief on the question of jurisdiction (R. 3), and will be discussed hereinafter.

The appellants admit in their brief, "The Supreme Court of Florida at first affirmed the decree of the Circuit Court on non-Federal grounds." (Page 2 of Brief). The appellants then state in their brief on the question of jurisdiction of the Supreme Court of the United States concerning their petition for rehearing, these words, "This petition called the attention of the Supreme Court of Florida to the applicable and controlling decisions of this Court as to the sufficiency of notices by publication directed to resident property owners." (Page 2 of Brief). Such so called applicable and controlling decisions cited by the appellants in their brief will be discussed hereinafter.

The only argument of the appellants in their brief on the question of jurisdiction of the Court consists of a statement therein that jurisdiction is conferred by Title 28, U. S. Code, Section 1257 (2) and the citation of six United States Supreme Court decisions (Pages 2-3 Brief). None of said decisions so cited is applicable as is hereinafter set forth. The first of said decisions was **MULLANE v. CENTRAL HANOVER BANK & TRUST COMPANY, 339 U.S. 306, 94 L ed 865, 70 S Ct 652.** This case involved the validity of a New York Statute concerning trust companies which permitted the trustee to have a judicial settlement of its account by publication in a newspaper. The Court in this case held such Statute to be unconstitutional.

The second case cited by appellants was **NEW YORK**

v. **NEW YORK, N.H. & H.R. CO., 344 U.S. 293, 97 L ed 333, 73 S Ct 299.** This case involved lack of notice to a creditor under the Bankruptcy Act. The creditor was not notified by mail but by publication in a newspaper. The Court held the failure to file a creditor's claim was excused for lack of proper notice.

The third case cited by the appellants was **COVEY v. TOWN OF SOMERS, 351 U.S. 141, 100 L ed 1021, 76 S Ct 724.** This case involved a foreclosure against an incompetent and whether or not he was properly served. In this case the New York Court of Appeals certified that due process was raised and decided by it.

The fourth case cited by appellants was **WALKER v. CITY OF HUTCHINSON, 352 U.S. 112, 1 L ed 2d 178, 77 S Ct 200.** This case involved a condemnation proceeding in which process was obtained by publication in a newspaper. The owner of the property concerned brought a suit in equity for the express purpose of obtaining a holding that the newspaper publication under a state statute was not due process. This court held that the same was not due process.

The fifth case cited by the appellants was **WISCONSIN ELECTRIC POWER COMPANY v. CITY OF MILWAUKEE, 352 U.S. 948, 1 L ed 2d 241, 77 S Ct 329.** The jurisdiction of this Court was taken in that case under the authority of the decision rendered in **WALKER v. CITY OF HUTCHINSON,** supra.

The sixth case cited by appellants was **LAMBERT v. THE PEOPLE OF THE STATE OF CALIFORNIA, 355 U.S. 225, 2 L ed 2d 228, 78 S Ct 240.** This case held that an

ordinance compelling convicted criminals to register was unconstitutional in the absence of such ordinance containing words that the criminals had knowledge of the ordinance or wilfully failed to register.

Thus we see that every decision cited by appellants either concerned process in judicial proceedings, or concerned construction of the bankruptcy law, or concerned a criminal prosecution for failure to do an act the asserted criminal did not know he was obligated to do. None of these cases are applicable to taxation by a state or city and not one case was cited by the appellants upon the question of the requisite notice involved in taxation or assessments of liens.

This Court has spoken several times in reference to the levying of special assessments against property both in connection with the question of benefits to the property concerned as well as the question of necessity for notice. It has held that where the improvement is made on authority of the legislature or by a municipality to which the State has granted legislative powers, the owners of the property have no constitutional right to be heard on the question of benefits.

Some of these cases are as follows:

BROWNING v. HOPPER, 269 U.S. 396, 70 L ed 330, 46 S Ct 141.

MEMPHIS & C.R. CO. v. PACE, 282 U.S. 241, 75 L ed 315, 51 S Ct 108.

CHESEBRO v. LOS ANGELES COUNTY FLOOD CONTROL DISTRICT, 306 U.S. 459, 83 L ed 921, 59 S Ct 622.

In **BROWNING v. HOPPER,** supra, the question was directly raised as to whether or not the owners of property would be deprived of due process of law under special assessments to build roads. The legislature did not create the road district, did not confine the same to any political subdivision, and did not contain anything to limit the selection of the property to be assessed. The act provided that by petition of voters selecting property an election should be called and if there was a two-third vote of the people such selection should constitute a road district. In that case this Court used the following language:

> "Where a local improvement territory is selected, and the burden is spread by the legislature or by a municipality to which the State has granted full legislative powers over the subject, the owners of property in the district have no constitutional right to be heard on the question of benefits."

In that case they did hold the statute unconstitutional because the district was not created by the legislature and there had been no legislative determination that the property would be benefited by the local improvement.

In **MEMPHIS & C.R. CO. v. PACE,** supra, State statutes creating road districts and permitting the levy of taxes against property therein were attacked under the due process clause of the Federal constitution. This Court held that the district was created by the legislature, that this was a question of law, and that the decision of the State on this question was controlling. This Court held therein that property owners in districts created under the authority of the legislature and being legislatively

created districts, were not entitled to notice and hearing as to the benefits conferred. This Court held in that case that where such a district was properly created under legislative authority the question of benefit to the property owners are matters which rest in the discretion of the State, and are not controlled by either the due process or the equal protection clause of the 14th Amendment. The validity of the statute was upheld.

The appellants in their brief have not seen fit to cite any cases involving special levies for local improvements or involving taxation in any of its phases. The cases last cited by the appellee are clearly applicable to the question of jurisdiction of the United States Supreme Court in this case.

APPLICABLE CASES WHERE THE SUPREME COURT OF THE UNITED STATES WILL NOT TAKE JURISDICTION

This Court has held that it will not review what was not decided by the highest state court. **WALTERS v. ST. LOUIS, 347 U.S. 231, 98 L ed 660, 74 S Ct 505.** This Court in the opinion in that case under headnote 5 thereof stated as follows:

> "Of course, we will not undertake to review what the Court below did not decide. * * * We have here only the very limited issue—does the statute or the ordinance on its face violate the Fourteenth Amendment?".

The United States Supreme Court will not review Federal questions where the judgment rests upon adequate State grounds, even though the opinion under re-

view might discuss such Federal questions. **BLACK v. CUTTER LABORATORIES, 351 U.S. 292, 100 L ed 1188, 76 S Ct 824.** In the opinion in this last case this question is decided under headnote 3 thereof.

Where the highest court of the State delivers no opinion and it appears that the judgment might have rested upon a non-Federal ground, the Supreme Court will not take jurisdiction to review the judgment. **DURLEY v. MAYO, 351 U.S. 277, 100 L ed 1178, 76 S Ct 806.**

The Supreme Court will not review where the Federal question was not raised in accordance with law. **EDELMAN v. CALIFORNIA, 344 U.S. 357, 97 L ed 387, 73 S Ct 293.** This question was discussed under headnote 1 in the opinion of the above case.

As has been shown in this brief hereinabove, the final decree of the trial Court did not mention the Constitution of the United States or the State but ordered that the City was without authority to impose liens. This was clearly only a State ground and the Supreme Court of Florida had no power to pass upon that which was not decided by the trial Court. The first attempt of the appellants to raise any Federal question was made in their petition for rehearing upon the final majority judgment of the Florida Supreme Court. The Florida Supreme Court did not at any time discuss any Federal question. The only disagreement between the judges was upon the question as to whether or not the City had the power under the statute to do what it did. The appellants in their said petition for rehearing attempted to bring in Federal questions by making it appear that proceedings involved were quasi judicial. As has been shown in this brief herein-

above, the matter involved is taxation through local assessments and has no connection with process in judicial proceedings.

CONCLUSION

The Supreme Court of Florida has decided a purely State question without discussing any Federal question. Its opinion is based purely upon a State ground. The trial Court or the Supreme Court of Florida did not decide any Federal question. The sole question involved was the validity of assessment for improvements upon property in a district established under authority of the legislature and this is purely a State question. Under Federal law the property owners have no right to notice in connection with such special assessments levied under authority of the legislature, although the Florida Statute prescribes that a notice shall be given by publication. The Supreme Court of Florida decided that statutory notice was properly given. Certainly there is no Federal question involved in this case, and even if there were, the State Court has decided the question upon a ground which is wholly a State ground. As shown in this brief, the appellants have failed to properly raise any Federal question in any Court, even assuming that any such question did exist.

Respectfully submitted,

MILTON M. FERRELL
Five Fifty Building
550 Brickell Avenue
Miami 32, Florida
Attorney for Appellee

I, MILTON M. FERRELL, attorney for the Appellee herein, and a member of the Bar of the Supreme Court of the United States, certify that on the _____ day of January, 1959, I served copies of the foregoing Appellee's Brief on the Attorneys for Appellants by mailing copies in duly addressed envelopes with sufficient postage prepaid to carry the said Brief to Clyde Epperson, Ingraham Building, Miami 32, Florida, Thomas H. Anderson, 908 First National Bank Building, Miami 32, Florida, and Herbert L. Nadeau, 908 First National Bank Building, Miami 32, Florida, Attorneys for Appellants.

MILTON M. FERRELL
Five Fifty Building
550 Brickell Avenue
Miami 32, Florida
Attorney for Appellee